

## DEPARTMENT OF COMMERCE

### Statement of Regulatory and Deregulatory Priorities

Established in 1903, the Department of Commerce (Commerce or Department) is one of the oldest Cabinet-level agencies in the Federal Government. Commerce's mission is to create the conditions for economic growth and opportunity across all American communities by promoting innovation, entrepreneurship, competitiveness, and environmental stewardship. Commerce has 12 operating units, which manage a diverse portfolio of programs and services ranging from trade promotion and economic development assistance to improved broadband access and the National Weather Service, and from standards development and statistical data production, including the decennial census, to patents and fisheries management. Across these varied activities, the Department seeks to provide a foundation for a more equitable, resilient, and globally competitive economy.

To fulfill its mission, Commerce works in partnership with businesses, educational institutions, community organizations, government agencies, and individuals to:

- **Innovate** by creating new ideas through cutting-edge science and technology, from advances in nanotechnology to ocean exploration to broadband deployment, and by protecting American innovations through the patent and trademark system;
- Support **entrepreneurship and commercialization** by enabling community development and strengthening minority businesses and small manufacturers;
- Maintain U.S. economic **competitiveness** in the global marketplace by promoting exports and foreign direct investment, ensuring a level playing field for U.S. businesses, and ensuring that technology transfer is consistent with our nation's economic and security interests;
- Provide effective management and **stewardship** of our nation's resources and assets to ensure sustainable economic opportunities; and
- Make informed policy decisions and enable better understanding of the economy and our communities by providing **timely, accessible, and accurate economic and demographic data**.

## **Responding to the Administration's Regulatory Philosophy and Principles**

Commerce's Regulatory Plan tracks the most important regulations that the Department anticipates issuing to implement these policy and program priorities and foster sustainable and equitable growth. Of Commerce's 12 primary operating units, three bureaus — the National Oceanic and Atmospheric Administration (NOAA), the United States Patent and Trademark Office (USPTO), and the Bureau of Industry and Security (BIS) — issue the vast majority of the Department's regulations, and these three bureaus account for all the planned actions that are considered the Department's most important significant pre-regulatory or regulatory actions for FY 2022.

### **National Oceanic and Atmospheric Administration**

NOAA's mission is built on three pillars: science, service, and stewardship – to understand and predict changes in climate, weather, oceans, and coasts; to share that knowledge and information with others; and to conserve and manage coastal and marine ecosystems and resources.

At its core, NOAA is a scientific agency. It observes, measures, monitors, and collects data from the depths of the ocean to the surface of the sun, and it does so following principles of scientific integrity. These data are turned into weather and climate models and forecasts that are then used for everything from local weather forecasts to predicting the movement of wildfire smoke to identifying the impacts of climate change on fisheries and living marine resources.

With respect to service, NOAA not only collects data but is mandated to make it operational, and NOAA seeks to be the authoritative provider of climate products and services. By providing Federal, State, and local government partners, the private sector, and the public with actionable environmental information, NOAA can facilitate decisions in the face of climate change. Such decisions can range from businesses planning the location of offices; insurance companies trying to incorporate climate risk into their insurance policies; and municipalities looking to ensure that plans for construction of new housing developments will be resilient to increasing sea level risk, flooding, and heavy precipitation.

The final pillar of NOAA's mission is stewardship. NOAA seeks to conserve our lands, waters, and natural resources, protecting people and the environment now and for future generations. As part of Commerce, moreover, NOAA recognizes that economic growth must go hand-in-hand with environmental

stewardship. For example, with respect to the nation's fisheries, NOAA looks simultaneously to optimize productivity and ensure sustainability in order to boost long-term economic growth and competitiveness in this vital sector of the U.S. economy. Similarly, national marine sanctuaries both protect important natural resources and also are significant drivers of eco-tourism and local recreation.

Within NOAA, the National Marine Fisheries Services (NMFS) and the National Ocean Service (NOS) are the components that most often exercise regulatory authority to implement NOAA's mission.

NMFS oversees the management and conservation of the nation's marine fisheries; protects marine mammals and Endangered Species Act (ESA)-listed marine and anadromous species; and promotes economic development of the U.S. fishing industry. NOS assists the coastal states in their management of land and ocean resources in their coastal zones, including estuarine research reserves; manages national marine sanctuaries; monitors marine pollution; and directs the national program for deep-seabed minerals and ocean thermal energy.

Much of NOAA's rulemaking is conducted pursuant to the following key statutes:

*Magnuson-Stevens Fishery Conservation and Management Act*

Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) rulemakings concern the conservation and management of fishery resources in the U.S. Exclusive Economic Zone (generally 3–200 nautical miles from shore). As itemized in the Unified Agenda, NOAA plans to take several hundred actions in FY 2022 under Magnuson-Stevens Act authority, of which roughly 20 are expected to be significant rulemakings, as defined in Executive Order 12866. With certain exceptions, rulemakings under Magnuson-Stevens are usually initiated by the actions of eight regional Fishery Management Councils (FMCs or Councils). These Councils are comprised of representatives from the commercial and recreational fishing sectors, environmental groups, academia, and Federal and State government, and they are responsible for preparing fishery management plans (FMPs) and FMP amendments, and for recommending implementing regulations for each managed fishery. FMPs address a variety of issues, including maximizing fishing opportunities on healthy stocks, rebuilding overfished stocks, and addressing gear conflicts. After considering the FMCs' recommendations in light of the standards and requirements set forth in the Magnuson-Stevens Act and in other applicable laws, NOAA may issue regulations to implement the proposed FMPs and FMP amendments.

### *Marine Mammal Protection Act*

The Marine Mammal Protection Act of 1972 (MMPA) provides the authority for the conservation and management of marine mammals under U.S. jurisdiction. It expressly prohibits, with certain exceptions, the intentional take of marine mammals. The MMPA allows, upon request and subsequent authorization, the incidental take of marine mammals by U.S. citizens who engage in a specified activity (e.g., oil and gas development, pile driving) within a specified geographic region. NMFS authorizes incidental take under the MMPA if it finds that the taking would be of small numbers, have no more than a “negligible impact” on those marine mammal species or stock, and would not have an “unmitigable adverse impact” on the availability of the species or stock for “subsistence” uses. NMFS also initiates rulemakings under the MMPA to establish a management regime to reduce marine mammal mortalities and injuries as a result of interactions with fisheries. In addition, the MMPA allows NMFS to permit the take or import of wild animals for scientific research or public display or to enhance the survival of a species or stock.

### *Endangered Species Act*

The Endangered Species Act of 1973 (ESA) provides for the conservation of species that are determined to be "endangered" or "threatened," and the conservation of the ecosystems on which these species depend. NMFS and the Department of Interior's Fish and Wildlife Service (FWS) jointly administer the provisions of the ESA: NMFS manages marine and several anadromous species, and FWS manages land and freshwater species. Together, NMFS and FWS work to protect critically imperiled species from extinction. NMFS rulemaking actions under the ESA are focused on determining whether any species under its responsibility is an endangered or threatened species and whether those species must be added to the list of protected species. NMFS is also responsible for designating, reviewing and revising critical habitat for any listed species. In addition, as indicated in the list of highlighted actions below, NMFS and FWS may also issue rules clarifying how particular provisions of the ESA will be implemented.

### *The National Marine Sanctuaries Act*

The National Marine Sanctuaries Act (NMSA) authorizes the Secretary of Commerce to designate and protect as national marine sanctuaries areas of the marine environment with special national significance due to their conservation, recreational, ecological, historical, scientific, cultural, archeological, educational, or aesthetic qualities. The primary objective of the NMSA is to protect marine resources, such as coral reefs, sunken historical vessels, or unique habitats.

NOAA's Office of National Marine Sanctuaries (ONMS), within NOS, has the responsibility for management of national marine sanctuaries. ONMS regulations, issued pursuant to NMSA, prohibit specific kinds of activities, describe and define the boundaries of the designated national marine sanctuaries, and set up a system of permits to allow the conduct of certain types of activities that would otherwise not be allowed.

These regulations can, among other things, regulate and restrict activities that may injure natural resources, including all extractive and destructive activities, consistent with community-specific needs and NMSA's purpose to "facilitate to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine areas." In FY 2022, NOAA is expected to have at least three regulatory actions under NMSA.

### *Coastal Zone Management Act*

The Coastal Zone Management Act (CZMA) was passed in 1972 to preserve, protect, and develop and, where possible, to restore and enhance the resources of the nation's coastal zone. The CZMA creates a voluntary state-federal partnership, where coastal states (States in, or bordering on, the Atlantic, Pacific or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes), may elect to develop comprehensive programs that meet federal approval standards. Currently, 34 of the 35 eligible entities are implementing a federally approved coastal management plan approved by the Secretary of Commerce.

## *NOAA's Regulatory Plan Actions*

Of the numerous regulatory actions that NOAA is planning for this year and that are included in the Unified Agenda, there are five, described below, that the Department considers to be of particular importance.

**1. Illegal, Unreported, and Unregulated Fishing; Fisheries Enforcement; High Seas Driftnet**

**Fishing Moratorium Protection Act (0648-BG11):** The United States is a signatory to the Port State Measures Agreement (PSMA). The agreement is aimed at combating illegal, unreported, and unregulated (IUU) fishing activities through increased port inspection of foreign fishing vessels and by preventing the products of illegal fishing from landing and entering into commerce. The High Seas Driftnet Fishing Moratorium Act (Fishing Moratorium Act) implemented provisions of the PSMA, and NOAA issued regulations under the Fishing Moratorium Act in 2011 and 2013. Since then, the provisions of the Fishing Moratorium Act have been amended by the Illegal, Unreported and Unregulated Fishing Enforcement Act of 2015 (Pub. L. 114-81) and the Ensuring Access to Pacific Fisheries Act (Pub. L. 114-327). This proposed rule would implement amendments made by these later two laws. NMFS will also propose changes to the definition of IUU fishing for the purposes of identifying and certifying nations.

**2. Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule (0648-BI88):**

Regulatory modifications are needed to further reduce the likelihood of mortalities and serious injuries to endangered North Atlantic right whales from vessel collisions, which are a primary cause of the species' decline and greatly contributing to the ongoing Unusual Mortality Event (2017 - present). Following two decades of growth, the species has been in decline over the past decade with a population estimate of only 368 individuals as of 2019. Vessel strikes are one of the two primary causes of North Atlantic right whale mortality and serious injury across their range, and human-caused mortality to adult females in particular is limiting recovery of the species. Entanglement in fishing gear is the other primary cause of mortality and serious injury, which is being addressed by separate regulatory actions.

**3. Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing**

**Endangered and Threatened Species and Designation of Critical Habitat (0648-BJ44):** This

action responds to section 2 of the Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (EO 13990) and the associated Fact Sheet (List of Agency Actions for Review). This is a joint rulemaking by NMFS and the FWS (the Services) to rescind the regulatory definition of the term “habitat.” This previously undefined term was defined by regulation for the first time in 2020 for the purpose of designating critical habitat under the ESA. Pursuant to Executive Order 13990, the Services also considered the alternatives of retaining the existing habitat definition or revising the habitat definition and will be considering any alternatives provided during the public comment period on the proposed rule.

**4. Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and**

**Designating Critical Habitat (0648-BK47):** This action responds to section 2 of the Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (EO 13990) and the associated Fact Sheet (List of Agency Actions for Review). This is a joint rulemaking by the Services to revise joint regulations issued in 2019 implementing section 4 of the ESA. Specifically addressed in this action are joint regulations that address the classification of species as threatened or endangered and the criteria and process for designating critical habitat for listed species. Pursuant to Executive Order 13990, the Services reviewed the specific regulatory provisions that had been revised in the 2019 final rule. Following a review of the 2019 rule, the Services are proposing to revise a portion of these regulations but are also soliciting public comments on all aspects of the 2019 rule before issuing a final rule.

**5. Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency**

**Cooperation (0648-BK48):** This action responds to section 2 of the Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (EO 13990) and the associated Fact Sheet (List of Agency Actions for Review). This is a joint rulemaking by the Services to revise joint regulations implementing section 7 of the ESA, which requires Federal agencies to consult with the Services whenever any action the agency undertakes, funds, or authorizes may affect endangered or threatened species or their critical habitat, to ensure that the action does not jeopardize listed species or adversely modify critical habitat. In 2019, the Services revised various aspects of the regulations governing the consultation process under ESA Section 7

including, significantly, how the Services define the "effects of the action," which has importance for determining the scope of consultation. Pursuant to Executive Order 13990, the Services reviewed the specific regulatory provisions that had been revised in the 2019 final rule. Following this review of the 2019 rule, the Services are proposing to revise a portion of these regulations, including "effects of the action," but are also soliciting public comments on all aspects of the 2019 rule before issuing a final rule. In addition to revising provisions from the 2019 rule, the Services are proposing to clarify the responsibilities of a Federal agency and the Services regarding the requirement to reinstate consultation.

### **The United States Patent and Trademark Office**

The USPTO's mission is to foster innovation, competitiveness, and economic growth, domestically and abroad, by delivering high quality and timely examination of patent and trademark applications, guiding domestic and international intellectual property policy, and delivering intellectual property information and education worldwide.

#### *Major Programs and Activities*

The USPTO is responsible for granting U.S. patents and registering trademarks. This system of secured property rights, which has its foundation in Article I, Section 8, Clause 8, of the Constitution (providing that Congress shall have the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries") has enabled American industry to flourish. New products have been invented, new uses for old ones discovered, and employment opportunities created for millions of Americans. The continued demand for patents and trademarks underscores the importance to the U.S. economy of effective mechanisms to protect new ideas and investments in innovation, as well as the ingenuity of American inventors and entrepreneurs.

In addition to granting patents and trademarks, the USPTO advises the President of the United States, the Secretary of Commerce, and U.S. government agencies on intellectual property (IP) policy, protection, and enforcement; and promotes strong and effective IP protection around the world. The USPTO furthers effective IP protection for U.S. innovators and entrepreneurs worldwide by working with other agencies to secure strong IP provisions in free trade and other international agreements. It also



provides training, education, and capacity building programs designed to foster respect for IP and encourage the development of strong IP enforcement regimes by U.S. trading partners.

As part of its work, the USPTO administers regulations located at title 37 of the Code of Federal Regulations concerning its patent and trademark services and the other functions it performs.

### *The USPTO's Regulatory Plan Actions*

#### **1. Final Rule: Changes to Implement Provisions of the Trademark Modernization Act of 2020**

**(0651-AD55):** The USPTO amends the rules of practice in trademark cases to implement provisions of the Trademark Modernization Act of 2020. This rule establishes ex parte expungement and reexamination proceedings for cancellation of a registration when the required use in commerce of the registered mark has not been made; provides for a new nonuse ground for cancellation before the Trademark Trial and Appeal Board; establishes flexible USPTO action response periods; and amends the existing letter-of-protest rule to indicate that letter-of-protest determinations are final and non-reviewable. The rule also sets fees for petitions requesting institution of ex parte expungement and reexamination proceedings, and for requests to extend USPTO action response deadlines.

The two new ex parte proceedings created by this rulemaking—one for expungement and one for reexamination—are intended to help ensure the accuracy of the trademark register by providing a new mechanism for removing a registered mark from the trademark register or cancelling the registration as to certain goods and/or services, when the registrant has not used the mark in commerce. The proposed changes will give U.S. businesses new tools to clear away unused registered trademarks from the federal trademark register and will give the USPTO the ability to move applications through the system more efficiently.

### **Bureau of Industry and Security**

BIS advances U.S. national security, foreign policy, and economic objectives by maintaining and strengthening adaptable, efficient, and effective export control and treaty compliance systems as well as by administering programs to prioritize certain contracts to promote the national defense and to protect and enhance the defense industrial base.

### *Major Programs and Activities*

BIS administers four sets of regulations. The Export Administration Regulations (EAR) regulate exports and reexports to protect national security, foreign policy, and short supply interests. The EAR includes the Commerce Control List (CCL), which describes commodities, software, and technology that are subject to licensing requirements for specific reasons for control. The EAR also regulates U.S. persons' participation in certain boycotts administered by foreign governments. The National Security Industrial Base Regulations provide for prioritization of certain contracts and allocations of resources to promote the national defense, require reporting of foreign government-imposed offsets in defense sales, provide for surveys to assess the capabilities of the industrial base to support the national defense, and address the effect of imports on the defense industrial base. The Chemical Weapons Convention Regulations implement declaration, reporting, and on-site inspection requirements in the private sector necessary to meet United States treaty obligations under the Chemical Weapons Convention treaty. The Additional Protocol Regulations implement similar requirements for certain civil nuclear and nuclear-related items with respect to an agreement between the United States and the International Atomic Energy Agency.

BIS also has an enforcement component with nine offices covering the United States, as well as BIS export control officers stationed at several U.S. embassies and consulates abroad. BIS works with other U.S. Government agencies to promote coordinated U.S. Government efforts in export controls and other programs. BIS participates in U.S. Government efforts to strengthen multilateral export control regimes and promote effective export controls through cooperation with other governments.

In FY 2022, BIS plans to publish a number of proposed and final rules amending the EAR. These rules will cover a range of issues, including emerging and foundational technology, country specific policies, CCL revisions based on decisions by the four multilateral export control regimes (Australia Group, Missile Technology Control Regime, Nuclear Suppliers Group, and Wassenaar Arrangement), and implementation of any interagency agreed transfers from the United States Munitions List to the CCL.

### *BIS's Regulatory Plan Actions*

#### **1. Authorization of Certain "Items" to Entities on the Entity List in the Context of Specific**

**Standards Activities (0694-AI06):** BIS is amending the EAR to clarify its applicability to releases of technology for standards setting or development to support U.S. participation in standards efforts.

2. **Commerce Control List: Implementation of Controls on "Software" Designed for Certain Automated Nucleic Acid Assemblers and Synthesizers (0694-AI08):** BIS is publishing this final rule to amend the CCL by adding a new Export Control Classification Number (ECCN) 2D352 to control software that is designed for automated nucleic acid assemblers and synthesizers controlled under ECCN 2B352.j and capable of designing and building functional genetic elements from digital sequence data. These amendments to the CCL are based upon a finding, consistent with the emerging and foundational technologies interagency process set forth in section 1758 of the Export Control Reform Act of 2018 (ECRA) (50 U.S.C. 4817), that such software is capable of being utilized in the production of pathogens and toxins and, consequently, the absence of export controls on such software could be exploited for biological weapons purposes.
3. **Information Security Controls: Cybersecurity Items (0694-AH56):** In 2013, the Wassenaar Arrangement (WA), a multilateral export control regime in which the United States participates, added cybersecurity items to the WA List, including a definition for "intrusion software." In 2015, public comments on a BIS proposed implementation rule revealed serious issues concerning scope and implementation regarding these controls. Based on these comments, as well as substantial commentary from Congress, the private sector, academia, civil society, and others on the potential unintended consequences of the 2013 controls, the U.S. government returned to the WA to renegotiate the controls. This interim final rule outlines the progress the United States has made in this area, revises implementation, and requests from the public information about the impact of these revised controls on U.S. industry and the cybersecurity community. These items warrant controls because these tools could be used for surveillance, espionage, or other actions that disrupt, deny or degrade the network or devices on it.
4. **Imposition of Export Controls on Certain Brain-Computer Interface (BCI) Emerging Technology (0694-AI41):** Section 1758 of ECRA, as codified under 50 U.S.C. 4817, authorizes

BIS to establish appropriate controls on the export, reexport or transfer (in-country) of emerging and foundational technologies. Pursuant to ECRA, BIS has identified Brain Computer Interface technology as part of a representative list of technology categories for which BIS will seek public comment to determine whether this is an emerging technology that is important to U.S. national security and for which effective controls can be implemented. In this Advance Notice of Proposed Rulemaking, BIS is seeking comments specifically concerning whether this technology could provide the United States, or any of its adversaries, with a qualitative military or intelligence advantage. In addition, BIS is seeking public comments on how to ensure that the scope of any controls that may be imposed on this technology in the future would be effective and appropriate with respect to their potential impact on legitimate commercial or scientific applications.

**5. Foundational Technologies: Proposed Controls (0694-AH80):** BIS is considering expanding controls on certain foundational technologies. Foundational technologies may be items that are currently subject to control for military end use or military end user reasons. Additionally, foundational technologies may be additional items, for which an export license is generally not required (except for certain countries), that also warrant review to determine if they are foundational technologies essential to the national security. For example, such controls may be reviewed if the items are being utilized or are required for innovation in developing conventional weapons or enabling foreign intelligence collection activities or weapons of mass destruction applications. In an effort to address this concern, this proposed rule would amend the CCL by adding controls on certain aircraft reciprocating or rotary engines and powdered metals and alloys. This rule requests public comments to ensure that the scope of these proposed controls will be effective and appropriate, including with respect to their potential impact on legitimate commercial or scientific applications.

**6. Removal of Certain General Approved Exclusions (GAEs) Under the Section 232 Steel and Aluminum Tariff Exclusions Process (0694-AH55):** On December 14, 2020, BIS published an interim final rule (the December 14 rule) that revised aspects of the process for requesting exclusions from the duties and quantitative limitations on imports of aluminum and steel discussed in three previous Commerce interim final rules implementing the exclusion process

authorized by the President under section 232 of the Trade Expansion Act of 1962, as amended (232), as well as a May 26, 2020, notice of inquiry. The December 14 rule added 123 General Approved Exclusions (GAEs) to the regulations. The addition of GAEs was an important step in improving the efficiency and effectiveness of the 232 exclusions process for certain Harmonized Tariff Schedule of the United States (HTSUS) codes for steel and aluminum that had not received objections. Commerce determined it could authorize imports under GAEs for these specified HTSUS codes for all importers instead of requiring each importer to submit an exclusion request. Subsequently, based on Commerce's review of the public comments received in response to the December 14 rule and additional analysis conducted by Commerce of 232 exclusion request submissions, Commerce determined that a subset of the GAEs added in the December 14 rule did not meet the criteria for inclusion as a GAE and should therefore be removed. Commerce is removing these GAEs in this interim final rule to ensure that only those GAEs that meet the stated criteria from the December 14 rule will continue to be included as eligible GAEs. Lastly, this interim final rule makes two conforming changes to the GAE list for a recent change to one HTSUS classification and adds a footnote to both GAE supplements to address future changes to the HTSUS.